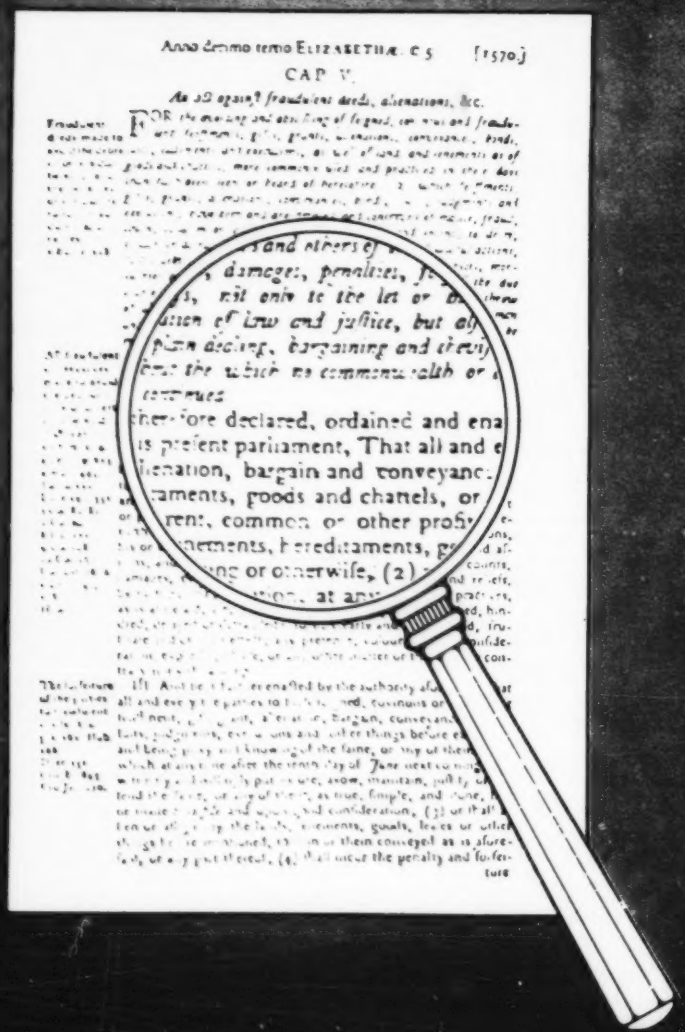
Law Reform Commission of Saskatchewan

THE BULK SALES ACT

Report to the Minister of Justice

Saskatchewan


Anno decimo tertio ELIZABETHÆ. c. 5 [1570]
CAP. V.
An act against fraudulent deeds, alienations, &c.
damages, penalties,
therefore declared, ordained and ena
is present parliament, That all and e
lienation, bargain and conveyanc
raments, goods and chattels, or
rent, common or other profi
nements, hereditaments, g
ing or otherwise, (2)
at any

THE BULK SALES ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

June, 1990

91-00865/

The Law Reform Commission of Saskatchewan was established by **An Act to Establish a Law Reform Commission** proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Mr. Dale G. Linn, B.A., LL.B., Chairman.

Madam Justice Marjorie A. Gerwing

Mr. Gordon J. Kuski, Q.C.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., LL.B. is the Legal Research Officer. The secretary is Mrs. Kate Rozdilsky.

Mrs. Georgette Sheridan was the consultant to the Commission on this project.

* * * * * * * * * * * * * * * * * *

The Law Reform Commission Act.

> 6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law....

* * * * * * * * * * * * * * * * *

Saskatchewan

Law Reform Commission of Saskatchewan

Provincial Office Building
122 Third Avenue North
Saskatoon, Canada
S7K 2H6
933-6127
(306) ~~664-6127~~

The Honourable J. Gary Lane, Q.C.
Minister of Justice
Province of Saskatchewan
REGINA, Saskatchewan

Dear Mr. Minister:

The Bulk Sales Act has long been subject to criticism by members of the legal profession and business community. Even the name of the legislation is misleading - it is not concerned with the sale of goods in bulk, but with the sale of retail businesses as going concerns.

The Commission undertook a review of the legislation in response to criticisms of specific provisions of the Act from a member of the practising bar. As research progressed, however, it became clear that the entire Act is out of step with contemporary business realities.

Adopted in 1911, at a time when secured credit was rarely advanced to merchants, the legislation places onerous duties on purchasers of businesses to protect trade creditors. Particularly since modernization of secured credit law by The Personal Property Security Act, The Bulk Sales Act has become an impediment rather than a facilitator of good business practice. It has been repealed in British Columbia, and repeal has recently been recommended in Alberta as well.

Pursuant to Section 9 of The Law Reform Commission Act, the Commission now submits this report recommending repeal of The Bulk Sales Act.

Respectfully submitted this 12th day of June, A.D. 1990.

Dale G. Linn,
Chairman.

Madam Justice Marjorie A. Gerwing,
Commissioner.

Gordon J. Kusk, Q.C.,
Commissioner.

Table of Contents

I.	INTRODUCTION	1
II.	BACKGROUND TO THE ACT	3
	1. The Origin of the Legislation	3
	2. Evolution of the Saskatchewan Act	5
III.	REVIEW OF THE LEGISLATION	8
	1. The Application of the Act - Sections 3 and 4	8
	2. The Definition Section - Section 2	13
	(a) Sale in Bulk	14
	(i) Partial Sale	15
	(ii) The Entire Stock-in-Trade	17
	(iii) An Interest in the Business or Trade	17
	(b) Stock	18
	(c) The Vendor and the Purchaser - Section 2(e)	19
	3. The Duties of the Purchaser - Section 5	20
	(a) Use of the Defined Terms	21
	(b) Partial Payment of Purchase Price	22
	(c) The Statutory Declaration	23
	(d) Who are Creditors?	26
	4. Waivers - Section 6(1)	29
	5. Notice to Creditors - Section 7	31
	6. Distribution of Sale Proceeds - Section 6	32
	7. The Trust Company Provisions - Sections 7 to 30	34
	8. The Penalty Provision - Section 31	35
	9. The Limitation Period - Section 39	37
IV.	CONCLUSION	39

I. INTRODUCTION

"The most poorly drafted article in the Code" were the words used by William D. Hawkland to describe the bulk sales provisions in Article 6 of the American *Uniform Commercial Code*.[1] Hawkland's strong indictment applies equally well to the Saskatchewan counterpart of Article 6, *The Bulk Sales Act*.[2]

Even the name "bulk sales"--used in both the *Act* and its American model--is unsatisfactory. The legislation regulates sales of businesses (stock in trade and other assets sold "in bulk" outside the normal course of business), not (as the uninitiated might suspect) wholesale of commodities. More importantly, the policy of the Act, first adopted in 1911, is no longer in step with commercial reality.

Sporadic amendments to the Act over the years have contributed to the problem, complicating the legislation and obscuring its policy. When the provincial Assignments Act was repealed in 1919, for example, amendments to *The Bulk Sales Act* were required. Unfortunately, the drafters of the amendments did not

---

[1] William D. Hawkland, "Proposed Revisions to U.C.C. Article 6," (1982/83) 38 Business Lawyer 1729.

[2] R.S.S. 1978, c. B-9.

accurately assess the effect of repeal of provincial bankruptcy legislation on the policy of *The Bulk Sales Act*, or properly compensate for it.

At the root of the problems with the Act, however, is a change in the commercial context in which it operates. The legislation was designed to protect creditors when a business enterprise is sold, but the increasingly sophisticated and less personal relation between creditor and debtor, and the advent of other legislation such as *The Personal Property Security Act* to regulate their relationships, has placed its utility in question. The policy goals it serves are no longer clear. It is a disjointed piece of legislation fraught with inconsistency and ambiguity.

In the Commission's opinion, *The Bulk Sales Act* has outlived its usefulness, and should be repealed. This report examines the problems plaguing the Act and the shifting policy goals it has attempted to serve in order to justify that conclusion. In the course of its research, the Commission considered model bulk sales legislation and the *Bulk Sales Acts* of other jurisdictions. Of particular assistance in this regard was a report of the British Columbia Law Reform Commission in 1983 that also recommended repeal of bulk sales legislation.[3] The British Columbia *Sale of Goods in Bulk Act*[4] was subsequently repealed. The repeal was welcomed by the legal and commercial communities in British Columbia, and has created no unexpected difficulties in the province.

---

[3] "Report on Bulk Sales Legislation", Law Reform Commission of British Columbia, Ministry of the Attorney General, 1983. More recently, the Alberta Law Reform Institute has also recommended repeal - see "The Bulk Sales Act", Report No. 56, January, 1990.

[4] R.S.B.C. 1979, c. 371.

II. BACKGROUND TO THE ACT

1. The Origin of the Legislation

Bulk sales legislation first came into force in Saskatchewan in March, 1911.[5] It was intended "to regulate the purchase, sale and transfer of stock of goods in bulk". Like bulk sales legislation in other jurisdictions, its purpose is to prevent an unscrupulous vendor from disposing of his business enterprise on the sly and absconding with the sale proceeds, leaving the claims of his creditors unpaid. The Act achieves this end by putting the responsibility for ensuring that the Act is complied with on the purchaser, who, if he fails to do so, is vulnerable to a multitude of rather harsh penalties. Unless the creditors otherwise agree, the statute requires that the proceeds of the sale be handed over to a trust company for distribution between vendor and creditors. It is the vendor's duty to provide the purchaser with a list of creditors; in turn, the purchaser has an implied duty to pass this list on to the trust company along with the sale proceeds. The trust company acts as a watchdog for the interests of the creditors, notifying them of the impending sale and ensuring that the sale proceeds are applied to their claims before paying the surplus to the vendor.

Bulk sales legislation in other jurisdiction similarly places the legal obligation to protect creditors on the purchaser. The Saskatchewan Act differs from its

---

[5] S.S. 1910-11, c. 38.

counterparts in other jurisdictions, however, in also enlisting trust companies as protectors of creditors' rights.

Bulk sales legislation was adopted early in this century in response to the efforts of creditor's organizations[6] to secure more adequate protection for their interests as the practise of supplying goods on credit became more common. Because the credit granted to retailers at that time was usually in respect of stock-in-trade, and was provided by suppliers, the focus of creditors' concern was the transfer of inventory when a business was sold. The model for the Saskatchewan Act was the bulk sales Article of the American *Uniform Commercial Code*, which had won the support of creditors' organizations in the United States.

There were two main reasons credit granters sought legislation to regulate sales of business stock "in bulk":

(a) while the actions of a rogue vendor would come within the definition of fraud, proving the fraudulent intent required by fraudulent transfer legislation was very difficult. Further, such legislation could be invoked only after the transfer had been completed. Often, the rogue could not be found or the proceeds had been dissipated by the time the creditors discovered the sale had occurred;

(b) at common law, assuming the purchaser had acted in good faith, the creditors had no remedy against the purchaser, who was entitled to possession of the merchant's stock. It should be noted that it was not the practice at the time bulk sales legislation was devised for suppliers to take a security interest in goods supplied.

---

[6] Most notably, the National Association of Credit Men in the United States and, in Canada, the Association of Canadian Credit Men.

Clearly, in the absence of an effective common law remedy or any obligation on the parties to notify creditors of a sale before its completion, creditors were vulnerable. Since relying on the vendor to give such notice would be much like expecting the fox to guard the chicken house, another means of enforcement had to be found. Placing the legal obligation on the purchaser was the novel, but effective solution to the problem proposed by bulk sales legislation.

2. Evolution of the Saskatchewan Act

The original Saskatchewan Act was much shorter than the present version, containing only eight brief sections. Contributing to its brevity was the fact that the "trust company" provisions (ss.7 to 30 in today's legislation) were not contained in the Act; rather, they were incorporated by reference from *The Assignments Act.*[7]

The Assignments Act was adopted in 1906 to fill the void created when the federal government temporarily vacated the field of bankruptcy and insolvency legislation. In an effort to provide some regulation in the area of bankruptcy, the Saskatchewan government, like those of many other provinces, enacted its own legislation to protect creditors of bankrupt debtors. *The Assignments Act* included provisions for appointment of a trustee (referred to at that time as the "Official Assignee"), notice to creditors, and the distribution of the estate of the bankrupt.

When federal bankruptcy legislation was re-enacted in 1919, the *Assignments Act* became unnecessary and indeed *ultra vires* the powers of the provincial legislature. The Official Assignee provisions were salvaged and dumped into the newly revised bulk sales statute. But only the crudest attempt was made to revise

---

[7] S.S. 1906, c. 64.

the language of the former bankruptcy legislation to integrate it into *The Bulk Sales Act.* This accounts for the undefined terms and inconsistent wording riddling sections 7 to 30 of the present Act. For example, s.7 refers to the "disposal of the estate", terminology generally associated with bankruptcy legislation. In the context of bulk sales legislation, the reference ought to be to "the distribution of the purchase monies from the sale in bulk". In s.21, reference is made to the payment of "dividends" to creditors. To be consistent with s.6 of *The Bulk Sales Act*, the words "*pro rata* share of the purchase monies" should have been substituted for this undefined term. Similarly, in s.30, the word "debtor", also undefined, is used when what is meant is "vendor" [s.2(e)].

There has been no major revision of the Act since 1920. In the years that followed, however, there were sporadic amendments. Some of the more significant additions include:

(a) in 1913, the penalty provision (which originally was limited to allowing the creditors to claim against the goods purchased) was shored up to make the purchaser personally liable for the vendor's debts to his suppliers, imposing the rather onerous duty on the purchaser of holding the purchased goods in trust for the benefit of the creditors;

(b) in 1930, a limitation period and a limited priority for the claims of the vendor's landlord over those of his other creditors were added to the Act;

(c) in 1934, a provision creating a preferential lien for municipalities which ranked above the landlord's claims was enacted; and

(d) in 1953, a third priority category ranking above the other two for claims for wages made by the employees of the vendor was added.

None of the amendments focused on the basic flaws in the legislation. The

standard seemed to have been set by the slip-shod revision of 1920. Nor did Saskatchewan take advantage of the opportunity presented by the development of model bulk sales legislation. In 1950, after much consideration, the Canadian Uniform Law Conference adopted the *Uniform Bulk Sales Act*[8] (referred to herein as the "*UBSA*"). With the model act to assist them, every province in Canada (except Quebec and Saskatchewan) has revised its legislation; the bulk sales statutes of Alberta[9], British Columbia[10], Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, the Yukon and the North West Territories[11] essentially adopted the provisions of the *UBSA*, although Ontario and, to a lesser extent, Alberta, made what are described by J.J. Catzman, one of the drafters of the new Ontario act, as "... many innovations and changes in policy and draftsmanship ..."[12]

---

[8] Proceedings of the Uniform Law Conference of Canada, 1950.

[9] R.S.A. 1980, c. B-13; currently under review by the Law Reform Commission of Alberta.

[10] R.S.B.C. 1978, c. 371; repealed May 17, 1985.

[11] R.S.M. 1970, c. B100; R.S.N.B. 1973, c. B-9; R.S. Nfld. 1970, c.28; R.S.N.S. 1967, c.28; R.S.O. 1980, c.52; R.S.P.E.I. 1974, c. B-6.

[12] J.J. Catzman, "Bulk Sales in Ontario", (1960) 3 Can. Bar J., pp. 28 - 38 at p.28.

III. REVIEW OF THE LEGISLATION

1. THE APPLICATION OF THE ACT - Sections 3 and 4.

The Bulk Sales Act is limited in its application to the sale of certain types of businesses:

> 3. This Act applies only to sales, barters and exchanges by traders and merchants, defined as follows:
> (a) persons who, as their ostensible occupation or part thereof, buy and sell goods, wares and merchandise ordinarily the subject of trade and commerce;
> (b) commission merchants;
> (c) manufacturers.

Section 4, however, excludes sales by executors, receivers, judicial officers and wholesalers.

Section 3 varies only slightly from the form in which it appeared in the 1911 legislation; the term "barters and exchanges" was added in 1913. The definition of "traders and merchants" is similar to that found in the UBSA, the *Uniform Commercial Code*, and most Canadian legislation.[13] Nevertheless, the section is not well-drafted. For instance, why is it necessary to list "commission merchants" as a separate category when they would appear to come within the general definition?

---

[13] See UBSA, s.2; R.S.M., s.3; R.S.N.B., s.2; R.S.Nfld., s.3.

The exclusion from bulk sales statutes of sales conducted by "executors, administrators, receivers or any public official acting under judicial process" is reasonably explicable. Such an exemption was likely considered necessary as sales of stock made by the individuals coming within the excluded category would generally be "...out of the usual course of business or trade..." of the vendor. The exclusion was probably intended to remove any ambiguity which might otherwise arise. Other aspects of the definition do not, however, appear to rest on such clear policy foundations.

Wholesalers are not excluded from Article 6 of the *UCC*[14] or the *Ontario and Nova Scotia Bulk Sales Acts*.[15] It may be that when the act was originally drafted, wholesalers did not present the same threat to commercial harmony as their colleagues in retail. At the present time, however, it would seem that the unsecured creditors of a wholesaler are as vulnerable as those of the retailer.

"Manufacturers" have been included in the definition of "traders and merchants" since the Act first appeared. There is, however, no definition of the term. Black's Law Dictionary defines a "manufacturer" as "[O]ne who by labor, art, or skill transforms raw material into some kind of a finished product or article of trade." Using this definition, a wide range of businesses - everything from makers of farm machinery to chocolatiers or potters - would be caught by the Act. However, it is unlikely that the drafters intended the Act to have such wide scope. In *John Martin Paper Co. Ltd. v. American Type Foundry Co.* [1924] 3 D.L.R. 1080 (Alta. App. Div.), the Court had this to say on the scope of the term "manufacturer"

---

[14] See Art.6-103, "Transfers Excepted from this Article".

[15] R.S.O. 1970, c. 52, s.2; R.S.N.S. 1967, c. 28, s.7.

in the analagous provision of the Alberta Act:

> It is perfectly obvious that the Legislature did not intend to include all business occupations. A building contractor, for example, certainly turns a mass of different material into a house or a shop building. And he might have a mass of material and plant on hand which he could sell out in bulk. So also with a bridge or paving contractor. Yet no one would, I think, seriously argue that such persons would come within the category of "manufacturers".

While it may be "perfectly obvious" that not all businesses were intended to be included, it is not so obvious which ones were.

Some jurisdictions have attempted to clarify the scope of the legislation by specifying, in addition to the general categories, a list of businesses which are caught by the statute. Section 2(d) of the *UBSA*, for example, lists "...hotels, motels, autocourts, rooming houses, restaurants, motor vehicle service stations, oil or gasoline stations, or machine shops."[16] The businesses listed are generally referred to as "service industries". In the absence of a provision specifically including them, enterprises engaged exclusively in the sale of services are excluded by the definition of "traders and merchants". Article 6 of the *UCC* also excludes service businesses by defining the "enterprises" to which it applies to include only ones whose "principal business is the sale of merchandise from stock". The Official Comment to the Code explains that this definition is intended to exclude "...such things as cleaning shops,barber shops, pool halls, hotels, restaurants and the like whose principal business is the sale, not of merchandise, but of services..."[17]

The obvious drawback to naming individual businesses in the body of the

---

[16] Manitoba, New Brunswick and Newfoundland have adopted similar provisions in their statutes.

[17] Thomas M. Quinn, *Quinn's Uniform Commercial Code Commentary and Law Digest, 1986 Cummulative Supplement No. 2*, ed. Barry Zaretsky (Boston-New York: Warren, Gorham & Lamont, 1986), p. 6-102[A][6].

statute is that, in today's fast-changing world, constant amendment is required to keep up with the new types of businesses being established in the commercial community.

Adding to this problem is the growing number of "mixed" businesses offering both services and goods for sale. A typical "mixed business" is the hairdressing salon. While at one time salons simply provided the service of hair grooming, most of them are now actively involved in the sale of hair dressing and cosmetic products, usually marketed exclusively through salons. These items surely come within the meaning of "...goods, wares and merchandise..." and are being sold as "...part of [the salon owner's] ostensible occupation..." Still, the business is one which traditionally has been seen as one of "service". Another example of a mixed business is the now ubiquitous "autolube" shop where the owner, in addition to providing service to vehicles, also sells some automotive products and, in some cases, a small inventory of cigarettes and snack food for the convenience of waiting customers.

Under legislation modelled on *The Uniform Bulk Sales Act*, the hair salon would be clearly beyond the scope of the statute because it cannot be characterized as a purely "sales" type of business as contemplated by the general definitions. Furthermore, it does not appear in the list of specifically included businesses. Since section 3 of the Saskatchewan Act does not contain a list of specifically included business, the question of whether a mixed sales/service business such as the hair salon or the autolube operation comes within the scope of the Act would depend upon the construction put on s.3 of the statute.

In a Saskatchewan case, *Barthels, Shewan & Co. v.Sloane*[18], heard shortly after the legislation first came into effect, the Court touched on the treatment to be given to a mixed business. The vendor was selling his hotel business; the creditors impugned the sale on the grounds of non-compliance with the Act. Because no part of the purchase money had been paid to the Official Assignee (predecessor of the "trust company" in today's Act), the Court held that the creditors were premature in their action and the sale could not be challenged. The judge did, however, comment on the application of the Act, holding that while the hotel building and furniture (not being "goods, wares or merchandise") would not come within the scope of the Act, miscellaneous items such as candy and cigarettes sold at the hotel desk would be considered "stock"[19]. Therefore, the sale of the hotel would be governed by the Act.

Some ten years later in *John Martin Paper Co. Ltd. v. American Type Foundry Co.*[20], the issue of the Act's application to a "mixed" business sale was squarely before the Alberta Appellate Division. In that case, it was held that where a business carries on more than one type of activity, it is the "line of regular business" which ought to be considered to determine whether the sale falls within the scope of the Act. The company in the *Martin* case was a "job-printer" engaged primarily in the business of printing stationery, envelopes, posters and the like. But from time to time, the company also sold envelopes and copying paper without having "printed" them. The Court rejected the suggestion that this altered the

---

[18] (1914), 19 D.L.R. 547 (Sask. S.C.).

[19] Also included was the hotel's liquor licence which, at that time, was specifically defined in s.6 of the *Act* as "stock".

[20] Op. Cit., p. 9.

character of the defendant's business, holding that:

> ...the evidence also shows that this was quite out of the line of the company's regular business. And it is with respect to its regular business, to the business or occupation which was its substantial purpose and in its usual course, that we must decide whether it could properly be called a manufacturer or a trader or merchant.

Given the state of the authorities, the problem facing the parties in the sale of a "mixed" business is that they have no way of knowing at the time of the transaction whether they ought to comply with the statute. It is only after the sale is challenged and a Court has ruled that they will know for sure. In view of the harsh penalties that may be imposed for non-compliance, the parties ought to be entitled to greater certainty.

2. THE DEFINITION SECTION - Section 2

A separate definition section was first included in the Act in the 1920 revision. The section was not well integrated into the body of the Act. Nevertheless, it has not been significantly amended since it became part of the Act.

The section contains only six defined terms. The first three terms - "court", "judge" and "municipality" - are straight-forward. The same cannot be said of the remaining three, "sale in bulk", "stock", and "vendor" - all terms whose meanings are pivotal to the proper intrepretation of the Act. Each is flawed with inconsistencies, ambiguities and omissions.

(a) Sale in Bulk

> S.2(c) "sale in bulk" includes a sale, transfer or conveyance of a stock, or part thereof, out of the usual course of business or trade of the vendor, a sale, transfer or conveyance of the entire stock-in-trade of the vendor and a sale, transfer or conveyance or attempted sale, transfer or conveyance of an interest in the vendor's business or trade;

This subsection purports to define the notion of a bulk sale. There are several problems with the definition, however. Some are simply examples of bad draftsmanship. Consider, for example, the use of the word "includes". When this term is used in a statute it normally implies that the defined term has a range of meanings beyond those specifically appearing in the definition. Both "means" and "includes" are used in s.2; it must therefore be assumed that "includes" was intended to connote something different from "means". It may be that "includes" was used with the intention of bringing the concept of "barters and exchanges", first mentioned in s.3 of the Act, within the meaning of "sale in bulk". This seems, however, a rather inelegant approach to a fairly simple drafting problem. Surely it would have been easier to include "barters and exchanges" in the s.2 definition of "sale in bulk", thereby avoiding the use of the ambiguous "includes".

Another problem with s.2(c) is its wordiness - i.e., the repeated use of the words "sale, transfer or conveyance" to describe the kinds of sales coming within the definition. The terms "transfer and conveyance" are normally associated with real property to which *The Bulk Sales Act* has no application. Nor is their inclusion necessary to understand the concept of "sale", which already appears in the definition. Ontario, whose original bulk sales legislation was modelled on that of Saskatchewan, revamped the Act in 1960 replacing its equally wordy definition

of "sale in bulk" with two simply drafted sub-sections:

> s.1(f) "sale", whether used alone or in the expression "sale in bulk", includes a transfer, conveyance, barter or exchange, but does not include a pledge, charge or mortgage;
>
> s.1(g) "sale in bulk" means a sale of stock out of the usual course of business of the seller.

But cleaning up the language used in the definition would not resolve basic conceptual problems. Whether a sale of any particular enterprise comes within the meaning of "sale in bulk" depends on the nature of the items and the manner in which the transaction is completed. The transfer will constitute a sale in bulk if:

(a) the transaction is a sale, barter or exchange; and

(b) it involves:

1. a stock or part thereof out of the usual course of business of the vendor;
2. the entire stock-in-trade of the vendor; or
3. an interest in the vendor's business or trade or an attempt to sell an interest in the business.[21]

The concepts underlined above are vague and ill-defined.

(i) The Partial Sale

The Act is triggered even if the vendor is disposing of only a portion of his business or trade, provided the sale takes place out of the ordinary course of his business. There is no quantitative threshold restricting the operation of the term "part thereof". The combined effect of the lack of a *de minimis* provision and the mandatory nature of the statute forces the parties to comply with the Act regardless of the size of the partial sale "out of the ordinary course of business."

---

[21] Note that "attempted" sales are not included within the meaning of the first two kinds of sales in bulk.

For example, assume a book store decided to sell some of its display shelves, having replaced them with new ones. The Act would be triggered. Clearly, the display shelves ("fixtures ordinarily used in connection with a business") would be "part of" the "stock"; further, the sale of display shelves would be outside the ordinary course of the business of selling books. The nuisance and expense of having to comply with the *Act* for such a trifling transaction would outweigh any benefit the bookseller might derive from the sale of the old shelves.

Extending the scope of the Act to partial sales may have been intended to prevent unscrupulous vendors from thwarting the Act by disposing of businesses in a series of small sales[22] or by selling all but a part of it. While, practically, there might not be any real danger of creditors' challenging the sale should the parties risk completing a trival sale without complying with the Act, the inclusion of the words "or part thereof" would seem to allow for absurd results if a challenge is actually made.

Other jurisdictions have tried, with only limited success, to avoid the problems created by the wording in the Saskatchewan Act by including a quantitative test in their legislation. In the bulk sales legislation of Alberta, Newfoundland and Ontario, the words "substantially all" are used to describe how much of the stock must be sold before the Act would apply. American bulk sales legislation also uses a quantitative norm. Article 6-102(1) of the *Uniform Commercial Code* stipulates that its provisions apply only to sales not in the ordinary course of business involving a "...major part of the materials, supplies, merchandise or inventory".

---

22 *Webber v. Hall*, (1921) 56 D.L.R. 253 (Nova Scotia S.C.).

The "substantially all" or "major part" tests are not without their own difficulties. It may be difficult to assess with any certainty what proportion of the stock of business will fulfill this requirement. Further, the legislation does not indicate how the valuation is to be made i.e., on the basis of the dollar value of the stock sold, the volume thereof, or some combination of the two.

(ii) The Entire Stock-in Trade

The term "stock-in-trade" is not defined nor is it clear what the drafters of the legislation intended by using this term in addition to the defined term "stock", which appears to mean the same thing. In any event, a sale of the "entire stock-in-trade" would seem to be no more than a special case of general proposition set out in the first part of the definition, i.e. the sale of "...the stock, or part thereof, out of the ordinary course of business of the vendor...".

It might also be noted that the sale of "stock" is qualified as being "out of the usual course of business", while the sale of "the entire stock-in-trade" is not. It was probably considered unnecessary to add this qualifier to the second head as normally a sale of the "entire stock-in-trade" would be, by definition, "out of the usual course of the business". Thus the reference to entire stock-in-trade is probably redundent. On the other hand, if "stock" is not equivalent to stock-in-trade", rather peculiar results might follow. A vendor fortunate enough to find a customer who wants "all you have in stock" might have to comply with the Act.

(iii) An Interest in the Business or Trade

The third head of the definition of "sale in bulk" is the sale, transfer or conveyance or attempted sale, transfer or conveyance of <u>an interest</u> in the vendor's business or trade.

The Act does not define the term "interest" nor is there any contextual information in the statute from which its meaning may be inferred. The leading (and apparently only) Canadian case dealing with this issue of interpretation is an early one from Ontario, decided just four years after that province enacted its bulk sales legislation. In *McLennan v. Fulton* (1921), 64 D.L.R. 558, the Ontario Court of Appeal held that a partner's share in a business was not an "interest" in the business within the meaning of *The Bulk Sales Act*. The Court characterized the partner's share in the business as a right to share in the surplus of the proceeds of the sale of the partnership assets after all of the debts of the business had been paid. Hence, the *Act* did not apply.

As a result of the *McLennan* interpretation, the term "interest in a business" was deleted from the revamped Ontario legislation[23]. The term has also been omitted from the *UBSA* and most of the provincial legislation[24] modelled on it.

(b) Stock

S.2(d) "stock" means any stock of goods, wares and merchandise ordinarily the subject of trade and commerce and the fixtures ordinarily used in connection with a business;

Apart from the failure (discussed above) to include the phrase "stock-in-trade" within this definition, the principal problem created by this definition relates to the inclusion of "fixtures" as "stock".

While the word "fixtures" has the technical legal meaning of personal

---

[23] Op.Cit., note 11.

[24] The *Bulk Sales Act* of Newfoundland has retained it in its definition of a "sale in bulk"; R.S.Nfld. 1970, c.B-9, s.(f)(iii).

property which by virtue of its attachment thereto has taken on the character of real property, it has a different meaning in the commercial world to which the Act applies. To a storekeeper, the word "fixture" or "trade fixture" probably suggests shelves, coolers, display cases and similar items used to enhance the sale of his merchandise. Whether or not they are attached to the floor, walls or ceiling of his store does not likely influence his perception of them as "fixtures".

There is some support within the statute for adopting the storekeeper's interpretation of "fixtures". The qualifying phrase "ordinarily used in connection with a business" seems to suggest that what the Legislature intended was not "fixtures" *per se* as a lawyer would understand the term, but rather "trade fixtures" as commonly understood in the business world. Also militating against the notion that "fixtures" is intended to be interpreted in the strict legal sense is inclusion of the term with "goods, wares and merchandise", a class of items that are clearly chattels. "True" fixtures do not belong in this class. Real property is not otherwise caught by the Act;[25] making an exception to include fixtures would be anomolous.

(c) The Vendor and the Purchaser - Section 2(e)

Although this entry in the definition section bears the heading "vendor", s.2(e) also contains a definition of the term "purchaser":

> s.2(e) "vendor" includes a person who barters or exchanges a stock in bulk for other property, real or personal, and "purchaser" includes the person who gives such other property in barter or exchange."

Like many of the defined terms in the Act, "vendor" and "purchaser" enjoy

---

[25] Barthels, *Shewan & Co. v. Sloane* (1914), 19 D.L.R. 547.

only limited use in the main body of the legislation. For example, although it could have been used to advantage in s.5, "Duties of the Purchaser", the term "purchaser" is not used to describe the person acquiring the stock sold in bulk; rather, there appears this long-winded and redundant description:

> "[E]very person who bargains for, buys or purchases a stock of goods, wares, merchandise or fixtures for cash or on credit or who bargains for the barter or exchange of a stock of goods, wares, merchandise or fixtures in bulk for any other property, real or personal..."

Apparently, the drafters of the Act had more faith in the term "vendor"; it appears in s.5 without further elaboration.

3. THE DUTIES OF THE PURCHASER - Section 5

The substantive nub of the Act lies in sections 5 and 6, both of which are afflicted with the same sort of poor draftsmanship as the definition section.

There is, in fact, no more eloquent testimony to the obscurities of the Act than section 5. It is one breathless sentence of Dickensian proportions:

> 5 Every person who bargains for, buys or purchases a stock of goods, wares, merchandise or fixtures in bulk for cash or on credit, or who bargains for the barter or exchange of a stock of goods, wares, merchandise or fixtures in bulk for any other property, real or personal shall, before closing the purchase, barter or exchange, and before paying to the vendor any part of the purchase price or giving any promissory note or notes or any security for the purchase price or part thereof, or before executing any transfer, conveyance or encumbrance of such other property, demand and receive from the vendor, and the vendor shall furnish to the purchaser, a written statement (form A) verified by the statutory declaration of the vendor or his authorized agent or, if the vendor is a corporation, by the statutory declaration of its president, vice-president, secretary treasurer or manager, containing the names of all the creditors of the vendor together with the amount of the indebtedness or liability due, owing, payable or accruing due by the vendor to each of his creditors.

The problems created by this linguistic triumph are various.

(a) Use of Defined Terms

Section 5 is a jumble of defined and undefined terms, redundant and ambiguous words. The following are examples of some of the more troublesome items:

"goods, wares, merchandise or fixtures" -

The use of these words in addition to the word "stock" is completely superfluous as "stock" means "goods, wares, merchandise and fixtures" [s.2(d)].

"buys or purchases...in bulk" -

Had they used the term "sale in bulk" to describe the transaction between the vendor and purchaser in s.5, the drafters of the legislation could have significantly reduced the wordiness of the section. The other consequence of not using the defined term is that the drafters inadvertently (it seems) excluded the notion of the sale of an interest in a business or trade from s.5, despite the fact that this type of bulk sale is defined under "sale in bulk". As s.5 refers only to the sale of "stock", there does not appear to be any interpretive avenue by which "an interest in business" may be brought within this section.

"for cash or on credit"-

By restricting bulk sales to one or the other of the above kinds, s.5 may operate to exclude from the scope of the Act a sale partly on cash terms and partly on credit. This issue was considered during the revamping of the Ontario Act and the words "for cash or on credit" were deleted.[26]

---

[26] Op.Cit., note 11.

(b) Partial Payment of Purchase Price

Because the disclosures required by the Act must be made "before paying to the Vendor any part of the purchase price, or giving any promissory note...", a purchaser is prohibited from making payment of any kind prior to the vendor's furnishing of particulars of his indebtedness in the form prescribed by the statute. This time-consuming requirement could jeopardise the sale. It also ignores the common business practice of securing the purchaser's offer with a deposit to be held in trust pending the completion of the sale.

This problem is not unique to the Saskatchewan legislation. Article 6-105 is similarly flawed. It provides that at least 10 days before the transferee pays for the goods, notice of the transfer must be given as required by the Article. William D. Hawkland, Chairman of the Subcommittee on Article 6 of the Uniform Commercial Code of the American Bar Association, a group which has been lobbying for revision, recommended that Art.6-105 be redrafted to permit payment of not more than one-half of the purchase price.[27] The Canadian *Uniform Bulk Sales Act* has also been drafted with this commercial practice in mind. Section 6 of the *UBSA* permits payment of not more than ten per cent of the purchase price to be held in trust by the seller pending compliance with the other provisions of the *Act*. This provision has been included in *The Bulk Sales Act* of Ontario, and incorporated in the legislation of other provinces following the *UBSA* model, although the amount of the partial payment has been reduced by some jurisdictions.[28]

---

[27] Op.Cit., note 1, p. 1743.

[28] Manitoba, R.S.M. 1970, c. B100, s. 5(4); Alberta, R.S.A. 1980, c. B-13, s. 4(1)(a); New Brunswick, R.S.N.B. 1973, c. B-9, s. 4-5 - $50; Newfoundland, R.S.Nfld. 1970, c. 28, s. 5(5) - $500 or 5%.

(c) The Statutory Declaration

The list of creditors is to be provided in a written statement verified by a statutory declaration of the vendor. The purchaser must "demand and receive" the document from the vendor and the vendor is required to "furnish" the names and addresses of all of the creditors of the vendor as well as the amount of the indebtedness to each. The Act prescribes the form of the statutory declaration [Form A].

The legislation is premised upon the notion that the vendor, though a rogue at heart, will feel compelled to make a truthful disclosure in his sworn statement. The weakness of this supposition is that a vendor who is primed to leave his trade creditors in the lurch is, in all likelihood, equally prepared to swear a false declaration.

Human frailties notwithstanding, every jurisdiction in North America has drafted its legislation in a similar fashion to permit the purchaser to rely on the information as it appears in the sworn statement, this document being, by definition, "true" at law. The courts in both Canada and the United States[29] have consistently held that where, on its face, the list of creditors appears to conform to the requirements of the legislation, the purchaser is not required to verify the contents or to make inquiry into the existence of other possible creditors. This approach makes sense because it is the purchaser who is penalized in the event of non-compliance, but it seriously compromises the effectiveness of the legislation.

---

[29] The leading American case on this point is *Adrian Tabin Corp. v. Climax Boutique Inc.*, 34 N.Y. 2d 210, 356 N.Y.S. 2d 606.

An early Quebec case, *Montreal Abbatoir v. Picotte* held that a declaration in proper form, though perjurious, will not void "une vente en bloc"[30]. In *Warner v. Graham*, the British Columbia Supreme Court held that the vendor's failure to disclose all of his creditors was not fatal to the sale in bulk because the vendor had complied with the formal requirements.[31] The Alberta Court of Appeal came to the same conclusion in *Thomson v. Richardson*.[32]

The most interesting recent decision in this respect is a recent Manitoba case, *A.G. of Canada v. Bulletin Publications*[33]. After reviewing several of the cases, the Court applied the reasoning in *Warner*. While the decision is in keeping with Canadian jurisprudence, it is nonetheless surprising in view of the peculiar facts upon which it was decided: the parties to the bulk sale were corporations; the solicitor for the vendor corporation acted for the purchaser as well, and was a director of each of the companies. A statutory declaration was prepared by the vendor and given to the purchaser. Unfortunately, one of the vendor's creditors, Revenue Canada, was missed. Revenue Canada did not look kindly on this omission and challenged the sale on the ground that it had not been completed in compliance with the Act. The Court held that even though the vendor had failed to name Revenue Canada in its list of creditors, the statutory declaration conformed to the Act on its face. Accordingly, the sale could not be set aside.

While these authorities are probably applicable in Saskatchewan, because of

---

[30] (1917) 52 Que.S.C. 373.

[31] (1946) 2 D.L.R. 277 (B.C.S.C.).

[32] (1967) 58 W.W.R. 743.

[33] (1980) 3 Man.R.(2d)14 (Man. County Ct.)

the unique "trust company" provisions in the legislation, the purchaser and the trust company are under slightly different obligations than their other North American counterparts, at least in cases in which the Act is not waived. Section 7 states that when a trust company is appointed to supervise the sale, it "...shall immediately inform itself by reference to the vendor and his records and books of account of the names and residences of the vendor's creditors...". The use of the word "shall" suggestes that the trust company is under a duty to inform itself from this source in addition to the information in the declaration.

Among the revisions to Article 6-104(3)of the *UCC* recommended by Hawkland[34] was one which would put the transferee under similar, but less rigorous, obligations to those of a trust company pursuant to s.7 of the Saskatchewan Act. Under Hawkland's proposed amendment, there would be an onus on the transferee to verify the information provided by the transferor in certain limited circumstances, i.e., where any errors or omissions are known or disclosed to him or are reasonably discoverable by him. Hawkland and his committee concluded that expecting the transferee to make inquiries or to examine the books of the transferor concerning his creditors would not be "unduly burdensome".

While it is possible that similar reasoning may account for the the trust company's duty to inform itself as set out in s.7 of the Saskatchewan Act, it seems more likely that this provision is not the result of thoughtful legislative drafting but rather yet another piece of undigested detritus plundered from *The Assignments Act* during the 1920 revision. When considered in its proper context as part of the former provincial bankruptcy legislation, the duty imposed on the

---

[34] Op.Cit., Note 1.

trust company by s.7 makes sense. It makes much less sense, however, when the same section appears in a statute that has already defined the means by which the vendor's creditors and the amount of their claims are to be determined.

(d) Who Are Creditors?

To paraphrase Gertrude Stein, a creditor is a creditor is a creditor. Section 5 of the Act requires the vendor to disclose the names and addresses of all of his creditors. No distinction is made between secured and unsecured creditors; nor is it significant whether or not the credit was given in relation to the business or trade that is the subject of the sale.

There are historical reasons why this would be so. When bulk sales legislation first came into being, the notion of acquiring items on credit did not enjoy its present popularity. In most cases, the merchant's only likely creditors were the suppliers of his stock. According to the practice of the day, the credit extended was unsecured, the suppliers relying instead on the merchant to use the proceeds generated from the sale of the goods to pay his debts to them. It was because of the creditors' unprotected position that they began to feel bulk sales legislation was necessary.

Today, however, commercial practice is vastly different. Very few businesses or trades are able to operate without more formal credit arrangements. Unsecured credit is becoming less common. Where it does occur, however, it is generally suppliers who continue to transact their business with merchants on this basis. The new player in the field, one not contemplated by the original proponents of bulk sales legislation, is the large lending institution which finances the operation of the business or trade. The bank protects its investment by taking a security

interest, not only in the stock purchased with the monies advanced to the merchant, but in every other aspect of the business as well - accounts receivable, proceeds, inventory, and equipment. Often, the merchant is also required to provide a personal guarantee. Under the provisions of *The Personal Property Security Act*[35], the bank may perfect its security interest in all of the merchant's present or after acquired property. By doing so, the bank, as a secured party, will rank in priority to the merchant's unsecured suppliers.

There is another aspect of modern commercial practice which is at odds with assumptions of Act. It is no longer uncommon for one merchant to have several businesses, each independent of the other and all financed to some extent. A problem arises when the merchant sells one of his businesses. Anyone unfamiliar with the arcane provisions contained in the *Bulk Sales Act* would probably assume that "all the creditors" means all the creditors in relation only to the business being sold. While this may have been what was originally intended, there is nothing in the wording of the Act to support this interpretation. In *Warner v. Graham*[36] the British Columbia Supreme Court held that "all of the creditors" could not be construed to mean only those related to the vendor's business. Consequently, as well as providing the names and addresses of those to whom he is indebted in relation to the business being sold, disclosures of personal debts unrelated to business, as debts of other businesses in which the vendor has an interest must be made.

Saskatchewan is not alone in its global approach to creditors. While Article

---

[35] S.S. 1979-80, c. P-6.1.

[36] Op.cit., note 31.

1-201(12) of the *Uniform Commercial Code* limits the protection of the bulk transfer article to unsecured creditors, no distinction is made between those who have granted credit in connection with the business and those who have not.

At first glance, the Canadian *Uniform Bulk Sales Act* appears to have taken a more progressive approach, categorizing those extending credit in one of three classes: "creditor", "secured trade creditor" and "unsecured trade creditor"[37]. A "creditor" means any creditor; a "secured trade creditor" and an "unsecured trade creditor" have a special status, the feature common to both being that the debt owed to them is for stock, money or services "...furnished for the purpose of enabling the seller to carry on a business...". Included in the definition of secured trade creditor is the person to whom the seller is indebted for rental of business premises. The key issue is whether the credit has been advanced in furtherance of the business that is the subject of the bulk sale.

To this point, the *UBSA* has done an admirable job. A problem, however, arises in the provisions governing the circumstances under which "creditors" are entitled to be consulted about the sale and to participate in the distribution of the sale proceeds. The *UBSA* provides that, initially, the seller is required to furnish the buyer with particulars of his indebtedness to the secured and unsecured trade creditors [s.4(2)], though pursuant to s.7, the purchaser must also deliver particulars of the sale to any "creditor" upon demand. Where the amount of indebtedness is $5,000.00 or less or where claims of the secured and unsecured trade creditors have been or will be paid in full, the sale can be completed without notice or payment of the sale proceeds to the non-trade creditors. Where this

---

[37] Ss.2(c), (h) and (k), respectively.

criteria cannot be met, however, a trustee must be appointed to handle the proceeds of the sale. It is at this point that the distinction between the creditors disappears. The seller is required to provide a second statement, this one to the trustee, showing "all of the creditors". Pursuant to s.13, all of the creditors are entitled to share in the proceeds distributed by the trustee. It is not clear why, when the sale proceeds are not sufficient to cover the seller's indebtedness to his trade creditors, their *pro rata* shares should be further reduced by permitting the non-trade creditors to participate in the distribution.

4. WAIVERS - Section 6(1)

The failure of the Act to distinguish between different types of creditors substantially reduces the advantage which might otherwise be gained by resorting to the waiver provisions contained in s.6(1). The general rule is that where the vendor is able to obtain a written waiver from the creditors representing not less than 60 per cent in number and amount of the claims shown in the statutory declaration, the parties need not comply with the Act. In order to satisfy this requirement, however, it is still necessary to prepare the statutory declaration as it is from this document that the validity of the waivers must be determined. Further, each of the creditors must be contacted and their written waiver obtained, a time-consuming task if there are many creditors involved.

The waiver requirements are further complicated by s.6(3). Where the actual cash to be paid in a sale (as opposed to a barter or exchange) is less than the total indebtedness of the vendor, and even if the creditors have waived the protection of the Act, the purchaser is required to "double check" their intentions. Pursuant to this subsection, the sale will be vulnerable to attack by the creditors unless the

purchaser obtains, in addition to the written waiver, the written consent of 60 per cent of the creditors in number and amount.

Clearly, the waiver option is something in the nature of a Hobson's choice; it may be as much of a hardship to fulfill the prerequisites to waive the statute as it is to complete the sale as required by the Act. The requirement that the protection of the statute be extended to "all the creditors of the vendor" is largely responsible for the impaired efficacy of the waiver.

The Act also places different obligations on the purchaser depending on whether the sale is cash or one involving the barter or exchange of property. Where the sale is by barter or exchange the purchaser must, in all cases, obtain the consent from the creditors regardless of the adequacy of the value of bartered property in relation to the vendor's indebtedness.

Under s.7 of the Saskatchewan Act, the trust company must convene a meeting of the creditors within 10 days of receiving the purchase price. Thus, the Act provides a reliable mechanism by which the validity of vendor-acquired waivers could be determined and necessary consents could be obtained. Surely, it is redundant to have the purchaser assume the role of watchdog as well. Other jurisdictions do not have provisions which empower a trustee to intervene in the way the trust company can under the Saskatchewan Act. The seller plays a more active role in acquiring the necessary waivers and consents. Under the *UBSA* (and all of the legislation based upon it), it is the seller who must obtain consents and provide them to the purchaser or, where one has been appointed, to the trustee. The Saskatchewan Act is unique in the onerous burden it places on the purchaser to safeguard the interests of the vendor's creditors. This is all the more extraordinary given the wide-reaching powers of the trust company to perform the

same function.

5. NOTICE TO CREDITORS - Section 7

Once the trust company has received the sale proceeds under s.6, it must comply with the notice requirements set out in s.7 of the Act. Within 10 days, the trust company notifies the creditors that a meeting will be held to settle the distribution of the sale proceeds. The trust company must also publish a notice of the meeting in the Saskatchewan Gazette, in this way presumably protecting creditors whose identities have not yet been discovered.

The importance of the Act's notice-giving function is clear from these requirements. The Official Comment to the *UCC* describes the notice mechanism contained in Art.6-105 as "the heart of the Article". In spite of these sentiments (and unlike the Saskatchewan legislation), however, Art. 6-105 makes no provision for public notice to be given. The transferee need only inform the creditors whose names appear in the list prepared by the transferor.

All Canadian jurisdictions require public notice to creditors. Some, including Ontario[38] and Prince Edward Island[39] whose legislation has incorporated s.13 of the *UBSA* in this regard, provide that the impending sale must be advertised in the local newspaper. This is probably a more effective method of giving notice to creditors than placing a notice in the provincial gazette (which is hardly likely to enjoy a large circulation among traders and merchants).

---

38 R.S.O. 1970, c.52, s.12(2).

39 R.S.P.E.I. 1974, c.B-6, s.7(4).

6. DISTRIBUTION OF SALE PROCEEDS - Section 6

Once notice has been given, the trust company is charged pursuant to s.6 with the duty of distributing the purchase monies on a *pro rata* basis among the creditors of the vendor. This includes creditors who have filed claims on their own as well as those named in the statutory declaration.

Subsection 6(1)(a) states that the distribution is to be made "...subject to any preference provided by law or previous contract," but in order to maintain a level playing field among the creditors, s.30(2) states that once the statutory declaration has been furnished, "...no preference or priority shall be obtainable by any creditor by attachment, garnishee process or otherwise"[40].

Pursuant to the scheme of preferences set out in the Act, the trust company must pay out the following in priority to the claims of the other creditors:

(a) under s.34(1), the claims of certain employees for wages, salaries, commissions or compensation for services rendered in the three-month period prior to the payment, delivery or transfer to the trust company up to a maximum of $500.00. This figure is very low by today's standards and would hardly begin to compensate the average full-time employee for three months' work;

(b) Under s.35(2), claims for municipal taxes that are not a lien on land. If this is not done, however, the stock (wherever it is found in the municipality) is deemed to be subject to a preferential lien for

---

[40] As the Act subsequently provides its own priority scheme which would fall within the meaning of "otherwise", it is suggested the words "except as otherwise provided in this Act" should have been added to s.30(2). Without this proviso, there is conflict between ss. 34, 35 and 36 which purport to give special priority status to certain classes of creditors and the clear wording of s.30(2).

the value of the taxes in the year of the sale and the year immediately preceeding. This apparently means that the stock, whether in the hands of the purchaser or a bona fide third party, would be vulnerable to distress by the municipality;

(c) Under s.36, claims by the vendor's landlord for rent accruing up to three months prior to the payment, delivery or transfer to the trust company. Unlike the wage priority provision, the Act imposes no monetary ceiling on the value of the rent. It is possible that the landlord, although ranking third, may fare better than the vendor's employees.

These priority provisions are unique in Canada. Other jurisdictions have not included any special priorities for bulk sales creditors, relying instead on the distribution scheme used in the federal *Bankruptcy Act*[41].

The Saskatchewan *Personal Property Security Act* will operate to elevate the claims of secured parties who have a perfected security interest in the vendor's stock and proceeds above those of unsecured creditors. Although the broad definition of "creditors" used in the BSA entitles secured creditors to receive notice of the impending bulk sale, notice is of importance to the secured creditors only if further action is required to perfect security interests. A perfected security interest will survive the bulk sale, leaving the secured creditor with his security interest in the property disposed of by the sale. It is unlikely in any

---

[41] The Bankruptcy Act, R.S.C. B-3. Although, Ontario has added to this a provision which purports to give municipaliities a "leg up"; R.S.O. 1970,c.52, s.13.

event that a purchaser would proceed with the purchase of a business without first conducting a search of the personal property register. This search would reveal the existence of any secured creditor who may claim a security interest in the assets of the business.

7. THE TRUST COMPANY PROVISIONS - Sections 7 to 30

It is the inclusion of sections 7 to 30 that make the Saskatchewan Act substantially longer and significantly different from the legislation of other jurisdictions. As discussed in detail above, having been orphaned by the demise of the *Assignments Act*, sections 7 to 30 found a new home in the *BSA*. No effort was made to integrate them into the bulk sales Act.

The powers invested in the trust company for the purposes of bankruptcy legislation were not revised to bring them in line with the role normally assumed by a trustee in the context of bulk sales. For this reason, the trust company charged with the duty of regulating a bulk sale in Saskatchewan has some extraordinary powers:

(a) under s.23, the trust company may without an order examine the vendor under oath to determine what means he may have of discharging his debts or to discover what debts may be owed to him. This section also permits the trust company to examine "... any person who is or has been an agent, clerk, servant, officer or employee of any kind of the vendor...";

(b) under s.25, if the vendor fails to attend such an examination or attends, but does not disclose his property or "...does not make satisfactory [whatever that means] answers repecting his property...", the vendor may be committed to jail for up to 12 months; and

(c) under s.28, the trust company is empowered to compel the attendance of any of the individuals named in s.23 and to compel them to produce books and documents "...subject to the same rules of examination and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined as if he were a witness in an action in court.";

While there do not appear to be any recorded cases involving trust companies who, heady with power, have abused the authority conferred by these sections, the potential is there as long as they remain in the Act. An informal survey of the Saskatchewan bar reveals that except for s.7, these sections are seldom, if ever, used.

8. THE PENALTY PROVISION - Section 31

The penalties for non-compliance with the Act are set out in s.31. Regardless of whose act or omission has caused the breach of the staute, it is the purchaser alone who will bear the consequences, an approach consistent with the underlying philosophy of the Act that places on the purchaser's shoulders the burden of safeguarding the interests of the vendor's creditors.

Pursuant to s.31, the vendor's creditors have a right of action against the purchaser to impugn the sale on the grounds of non-compliance with the Act. Further, s.32 reverses the onus of proof; the plaintiff creditor need only allege that the statute has been breached, whereupon the purchaser has the obligation of proving compliance. If he fails to do so, the purchaser may suffer one or more of the following penalties:

(a) as between the purchaser and the creditors, the bulk sale shall be

deemed to be fraudulent and void;

(b) the purchaser shall be deemed to be indebted to the vendor for the full amount of the purchase price so that the debt may be attached by the creditors;

(c) the stock acquired by the purchaser may be seized to satisfy the claims of the purchasers; and

(d) the purchaser shall be deemed to be a trustee of the stock for the benefit of the creditors and shall be liable to account to them for any amounts realized in the disposition of the stock.

Given the reverse onus provision and the severity of the penalties, the purchaser ought not to take lightly his duty of ensuring compliance with the Act. The imposition of such penalties could seriously jeopardize the viability of the purchaser's newly acquired business. In effect, he could end up paying the purchase price twice. Moreover, being held liable for such a payment would contravene the standard form security agreements favoured by most lending institutions, putting his financing at risk.

Less clear are the consequences that would follow should the trust company fail to perform some of its duties - for instance, the duty in s.7 to "...immediately [upon payment of the purchase price] inform itself by reference to the vendor and his records and books of account of the names and residences of the vendor's creditors...". This is a rigorous and time-consuming duty, especially since (pursuant to s.30(1)) the fees chargeable by the trust company shall not exceed three per cent of the claims paid to the creditors.

Not surprisingly, there do not appear to be any recorded cases assessing the extent of the trust company's duty to "inform itself". According to the clear

language of the statute, however, it would seem that the trust company must do more than merely rely on the statutory declaration when assessing the vendor's indebtedness. And because s.31 does not concern itself with whose act is responsible for the non-compliance, if the trust company fails to observe its statutory duties, the purchaser could conceivably find himself answerable to the creditors.

All of the other mandatory provisions of the Act apply to either the purchaser or the trust company. Breach of any of them might amount to non-complicance, triggering the penalty provision. The duties placed on the purchaser that fall into this category include:

(a) to withhold payment of any portion of the purchase price to the vendor;

(b) to pay the purchase price or transfer bartered property to the trust company;

(c) to provide the trust company with Form A;

(d) to obtain the consent of the creditors in certain circumstances; and

The duties of the trust company include:

(a) to inform itself from Form A and the vendor and his records of the vendor's indebtedness;

(b) to follow the notice-giving procedures;

(c) to distribute the purchase monies on a *pro rata* basis among the known creditors.

9. THE LIMITATION PERIOD - Section 39

Section 39 of *The Bulk Sales Act* provides:

s.39 No action shall be had or proceedings taken to set aside or have

> declared void any sale in bulk for failure to comply with this Act unless the action is brought or the proceedings are taken within 60 days from the date of the sale or within 60 days from the date when the creditor attacking the sale first had notice thereof.

Although described in the marginal notes as a "Limitation of Action", the true effect of s.39 is to extend indefinitely the creditors' right to commence an action to void the bulk sale.

Until a creditor has actual knowledge that the sale has occurred, he is not barred from challenging the transaction as long as he brings the action within 60 days of discovering the sale. This leaves the purchaser in a permanent state of uncertainty as it is he who will suffer the consequences if a sale is set aside.

No other jurisdiction has taken the Saskatchewan approach. In Canada, most jurisdictions have duplicated the *UBSA* limitation period of six months from the date of sale. In Ontario and Nova Scotia, the legislation also includes a registry mechanism as set out in s.12(1) of the *UBSA*. The filing of certain sale documents with the appropriate judicial office is constructive notice; the six-month period begins to run at the time of filing.

In other parts of the country, it has been considered appropriate to arbitrarily cut off the creditors' rights to seek redress after a period of a few months from the occurrence of a specified event[42] thereby avoiding the uncertainty caused in Saskatchewan by s.31. It should be remembered, however, that in other jurisdictions, the legislation places a greater onus to carry out statutory duties on the vendor whose acts and omissions are beyond the control of the purchaser.

---

[42] Six months: R.S.A. 1980, c.B-13, s.12; R.S.M. 1970, c.B100, s.12; R.S.N.B. 1973, c.B-9, s.11; R.Nfld. 1970, c.28, s.13; R.S.O. 1970, c.52, s.19; R.O.N.W.T. 1974, c.B-3, s.12. Four months: R.S.P.E.I. 1974, c.B-6, s.11.

IV. CONCLUSION

The *Bulk Sales Act* came into being in response to a need to equalize the relationship between the merchant with rogue potential and the creditor who provided goods or financing without security. The factual premise upon which the legislation was originally based, however, is no longer a true reflection of the world of commerce. Today's credit granters are more sophisticated than they were in 1911; they do not rely on the Act to provide security for extending credit. Furthermore, the statute so hampers the process of purchasing a business that vendors and purchasers often seek ways to avoid it, or ignore it altogether, preferring to risk the harsh penalties for non-compliance.

The most significant change in the commercial world since *The Bulk Sales Act* was adopted in 1911 is the growth of secured credit to finance acquisitions of stock in trade by retail merchants. While a supplier of goods may still occasionally place goods with a merchant without taking a security interest in them, it is now much more common for the merchant to either give his wholesale supplier a security interest in the goods he receives, or to finance his entire operation with a bank or other lending institution which would invariably insist upon taking a security interest not only in the goods purchased with the loan but in the vendor's other business assets as well.

The Personal Property Security Act provides a simple, inexpensive and

effective way for credit grantors to secure repayment of funds advanced for payment for goods supplied. The security agreement creating the security interest can be drafted the meet the needs of the individual creditor. Typically, it will include clauses that will accelerate payment of the entire debt in the event of a bulk sale, clauses which will provide for future security interests in stock, as and when acquired, and which will extend to the proceeds of any sale of stock.

The contemporary approach to business financing, and the protection for secured creditors provided by the PPSA, diminishes the role of the draconian *Bulk Sales Act*. It remains the case, of course, that unsecured creditors enjoy none of the rights provided to secured creditors. They must rely exclusively on the merchant's willingness to repay his debts. Even though unsecured business creditors are now few in number, it might seem that at least something of the policy of the BSA should be salvaged to provide them with some protection in circumstances where a business is sold and the proceeds are not sufficient to cover the vendor's total indebtedness. Ironically, however, it is in just such a situation that the BSA will be of least use to the unsecured creditors. Having received notice of the impending sale under the BSA, it may be cold comfort, if, in the final analysis, the secured creditors have scooped all the money as a result of their priority status under the PPSA.

The reality is that the BSA is no longer able to provide the protection it once did because the rules (and perhaps the game) upon which it was premised have changed dramatically. The PPSA provides a less complicated and more effective means of protecting creditors interests. What justification is there for continuing to provide an additional, though not particularly reliable, safety net for specific class of creditors who chose to remain unsecured?

The review of the BSA in this report demonstrates that the legislation is conceptually flawed, poorly drafted, and often inequitable in its application. While it might be possible to salvage the basic approach of the legislation, any attempt to do so would probably create as many problems and controversies as are generated by the existing Act. It is worth noting that in the United States, the American Bar Association's Corporations, Banking and Business Law Section established a sub-committee to recommend revisions to article 6, the bulk sales provision of the Uniform Commercial Code[43]. The changes proposed by the sub-committee generated a lot of controversy, and more than one commentator concluded that if acceptable revisions could not be made to the legislation, it should be repealed.[44] Certainly, the legislation cannot bear any more haphazard revisions. As one American commentator noted, "...if the job cannot be done right, then it should not be done at all."[45]

The Commission has concluded that the Saskatchewan *Bulk Sales Act* simply cannot be converted into a viable mechanism for the protection of creditors' interests in the context of contemporary credit practices. It is legislation that has outlived its usefulness, and become an impediment rather than a facilitator of good business practice. In the Commission's opinion, *The Bulk Sales Act* should be repealed.

---

[43] Published by its Chairman, William D. Hawkland, "Proposed Revisions to U.C.C. Article 6", (1982/83) 38 Business Lawyer 1729.

[44] Donald J. Rapson, "U.C.C. Article 6: Should It Be Revised or 'Deep-Sixed'? ", (1982/83) 38 Business Lawyer 1753 at p.1754; Don L. Baker, "Bulk Transfers Act - Patch, Bury or Renovate?", (1982/83) 38 Business Lawyer 1771 at p.1772.

[45] Ibid., p.1771.